91-450

RECORD NO. _____

IN THE

Supreme Court of the United States

October Term 1991

MICHAEL LOVELL HINTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

I. Should this Court resolve the direct conflict among the Third, Fourth, Fifth, Seventh, Ninth, and Tenth Circuits and establish a uniform rule concerning supplemental jury instructions and the Allen charge.

II. Should this Court overrule, or at least limit its much criticized supplemental jury instruction derived from *Allen v. United States*, 164 U.S. 492 (1896).

III. Should this Court overrule the conviction of Michael L. Hinton because the verdict was the product of the use of a supplemental jury instruction derived from *Allen v. United States*, 164 U.S. 492 (1896), which was proven to be coercive and therefore a violation of the Sixth Amendment of the Constitution of the United States.

IV. Should this Court find that the Court of Appeals for the Fourth Circuit's acceptance of evidence gained through a wiretap where the government violated the minimization requirement, was a violation of the Fourth Amendment of the Constitution.

LIST OF PARTIES

Petitioner and Respondent are named in the caption and were also parties before the U.S. Fourth Circuit Court of Appeals. The following parties were before the Fourth Circuit but are not before this Court by reason of this petition: Barry Johnson, a/k/a William Brown, Derrick Scott Mitchell, and Hess Victor Branch. Petitioner believes that these three (3) parties may have an interest in the outcome of this petition for certiorari filed by Petitioner. A notice complying with Rule 12.4 of the Court will be served on each of these three (3) parties, as well as upon all other parties to the proceeding below, namely, the Respondent shown in the caption.

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1991

MICHAEL LOVELL HINTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Michael Lovell Hinton, Petitioner, asks this Court for writ of certiorari to review the June 17, 1991 decision of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

Michael Lovell Hinton was convicted for conspiracy to possess cocaine with the intent to distribute. Hinton was named in Count One of four counts superseding an indictment filed in the United States District Court for the District of Maryland, at Baltimore, on November 4, 1989, charging him and thirteen others with conspiracy to possess cocaine with the intent to distribute, in violation of 21 U.S.C. § 846. The United States Court of Appeals for the Fourth Circuit affirmed the decision on June 17, 1991.

JURISDICTION

The Fourth Circuit Court of Appeals filed its opinion on June 17, 1991. A. 2 Jurisdiction lies under 28 U.S.C. § 1254 (1) for this Court to review the final decision of the Fourth Circuit Court of Appeals. This petition for certiorari is being filed under Rules 10.1 (a), 13.1 and 13.4 of this Court.

STATEMENT OF THE CASE

This is an appeal, originating from the conviction of Michael L. Hinton (petitioner here, appellant below) for conspiracy to possess cocaine with the intent to distribute. Hinton was named in Count One of four counts superseding an indictment filed in the United States District Court for the District of Maryland on November 30, 1989, charging him and thirteen others with conspiracy to possess cocaine with the intent to distribute, in violation of 21 U.S.C. § 846. The United States Court of Appeals for the Fourth Circuit affirmed.

Hinton was tried before a jury commencing on May 1, 1990. The trial court concluded its instructions on the fourth day of the trial, a Friday, and the jury retired to deliberate at 2:38 p.m. App. 19. At about 5:00 that evening, the court dismissed the jury for the weekend. App. 20-21. The jury returned on Monday, May 7, and began deliberations at 9:55 a.m. App. 26. At 2:45 p.m. the jury returned a note asking, "what happens if we have reached verdict on two defendants but

are deadlocked about the third?" App. 27. The court instructed the jury that it had the right to return a partial verdict, but that such a verdict would not be subject to revision as the jury continued to deliberate on the remaining issues. It also instructed the jury, over objection as follows:

> It is the desire of the court and all parties that, if possible, you return a verdict on all defendants if you can do so without violating your individual conscience; but, as I told you, you may return a verdict as to less than one - - less than all defendants if you wish to do that; and what I am going to do now is ask you to go back in the jury room and decide whether you wish to follow that procedure or if you simply wish to continue your deliberations until you have reached a unanimous verdict as to all of the defendants. App. 30.

At 3:25 p.m. the jury returned with a note stating, "Will you accept a deadlock as a verdict?" App. 32. The Court, again over defendants' objection, gave the modified Allen instruction

set forth in footnote 7 of *United States v. Sawyers*, 423 F.2d 1335 (4th Cir. 1970). App. 35-36. The jury again recessed at 3:38 p.m. The jury returned at 5:45 p.m., May 7, 1990 with guilty verdicts as to all of the defendants, App. 41.

Michael L. Hinton was sentenced on July 23, 1990 to 151 months. App. 6 Count Two, Three and Four of the superseding indictment were dismissed at that time. The United States Court of Appeals for the Fourth Circuit affirmed the conviction.

Pertinent evidence in the case at bar involved a wire tap which commenced on October 4, 1989 and continued until November 20, 1989. Recordings of nineteen conversations intercepted through the wire tap were played for the jury during the trial. Several of the calls involved the discussion of drugs. Others, however, were conversations between the defendants and their attorneys.

REASON FOR GRANTING CERTIORARI

The conflict between the approaches to the Allen charge taken by the Courts of Appeals is reason enough to grant this petition for uniformity and predictability in supplemental jury instructions. A substantial argument has been advanced that the rule established in *Allen v. United States*, 164 U.S. 492 (1986), has been frequently extended and embellished, far beyond the language set out in that decision.

In addition the Court of Appeals for the Fourth Circuit violated the Fourth Amendment of the United States Constitution when refusing to suppress evidence obtained through an intercepted wire communication which ignored the minimization requirement set out in 18 U.S.C. § 2518 (5).

In light of the strengths of the arguments, in reference to the Allen charge and the Court of Appeals for the Fourth Circuits violation of the Fourth Amendment of the Constitution, I would grant this petition.

I.

THIS COURT SHOULD RESOLVE THE DIRECT CONFLICT AMONG THE THIRD, FOURTH, FIFTH, SEVENTH, NINTH, AND TENTH CIRCUITS AND ESTABLISH A UNIFORM RULE CONCERNING SUPPLEMENTAL JURY INSTRUCTIONS AND THE ALLEN CHARGE

The circuits have been and continue to be in conflict on the viability of the Allen charge. The Allen charge, deriving its name from *Allen v. United States*, 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896), refers to "supplemental instructions urging a jury to forego their differences and come to an unanimous decision." *United States v. Bottom*, 638 F.2d 786 n. 4 (5th Cir. 1981).

A. THE THIRD CIRCUIT AND FOURTH CIRCUIT

The Third Circuit has outlawed future use of the Allen charge and, where some form of supplementary jury instruction

seems appropriate, they have recommended and the Fourth Circuit has approved a version of the Allen charge formulated in Mathes & Devitt, *Federal Jury Practice and Instructions*, § 79.01 which was adopted by the Judicial Conference of the United States [1] *See, United Sates v. Fioravanti*, 412 F.2d 407 (3rd Cir. 1969); *United Sates v. Sawyers*, 423 F.2d 1335, 1342 n. 7 (4th Cir. 1970.

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[1] *It is your duty, as jurors, to consult with one another, and to deliberate with a view to reaching an agreement if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but to do so only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberation, do not hesitate to reexamine your own opinion, if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.*

B. THE FIFTH CIRCUIT

The Fifth Circuit, although sometimes reluctantly, has approved the Allen charge, while carefully assuring themselves that there are no partial or one-sided comments within it and it is issued in the proper circumstances. *Thaggard v. United States*, 354 F.2d 735, 739 (5th Cir. 1965) *cert. denied* 383 U.S. 958, 86 S.Ct. 122, 16 L.Ed.2d 301 (1966). This charge, should make plain to the jury that each member has a duty conscientiously to adhere to his own honest opinion and avoid creating the impression that there is anything improper, questionable or contrary to good conscience for a juror to cause a mistrial.

C. THE SEVENTH CIRCUIT

The Seventh Circuit has advised that district judges should be "sparing and cautious" in using Allen-type charges, *United States v. Knaack*, 409 F.2d 418 (7th Cir.), *cert. denied*, 396 U.S. 831, 90 S.Ct. 87, 24 L.Ed.2d 83 (1969), and has recommended

use of the A.B.A. approved charge where one is necessary.[2]

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[2] *The American Bar Association Project on Minimum Standards for Criminal Justice and the Committee on the Operation of the Jury System of the Judicial Conference of the United States Courts have both recommended that the Allen charge no longer be given to deadlocked juries, and have recommended the following alternative supplemental instruction:*

5.4 Length of deliberations; deadlocked jury.

(a) Before the jury retires for deliberation, the court may give an instruction which informs the jury:

(I) that in order to return a verdict, each juror must agree thereto;

(II) that jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;

(IV) that in the course of deliberations, a juror should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous.

(V) that each juror who finds himself in the minority shall reconsider his view in the light of the opinions of the majority, and each juror who finds himself in the majority shall give equal consideration to the view of the minority.

(VI) that no juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose or returning a verdict.

United States v. Brown, 411 F.2d 930 (7th Cir. 1969).

D. THE NINTH CIRCUIT

Arizona and Montana have banned the Allen charge entirely. *State v. Thomas*, 86 Ariz. 161, 342 P.2d 197 (9th Cir. 1959); *State v. Randall*, 137 Mont. 543, 353 P.2d 1054 (9th Cir. 1960).

E. THE TENTH CIRCUIT

The Tenth Circuit has suggested that if an Allen charge is given, it must be given in the main charge. *United States v. Wynn*, 415 F.2d 135 (10th Cir. 1969).

(b) If it appears to the court that the jury has been unable to agree, the court may require the jury to continue their deliberations and may give or repeat an instruction as provided in subsection (a). The court shall not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals. Subparagraph (V) was not included in the American Bar Association recommended charge.

II.

THIS COURT SHOULD ESTABLISH A UNIFORM RULE CONCERNING SUPPLEMENTAL JURY INSTRUCTIONS AND THE ALLEN CHARGE, IN LIGHT OF THE FACT THAT THE RULE ESTABLISHED IN *ALLEN* HAS BEEN FREQUENTLY EXTENDED AND EMBELLISHED FAR BEYOND THE LANGUAGE SET OUT IN THAT DECISION

Cases show that the exact form of the supplemental jury instruction which did receive approval in the *Allen* has frequently been extended and embellished, far beyond the language original set forth.[3]

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[3] *As taken from page 501 of 164 U.S. Reports, page 157 of 17 S.Ct. the charge approved on appeal was as follows:*

That, although the verdict must be the verdict of each individual they should examine the question submitted with candor, and with a proper regard and difference to the opinions of each other; that it was their duty to decide the case if they could conscientiously do so; that they should listen, with a disposition to convinced, to each other's arguments; that, if much the larger number were for

Thaggard, 354 F.2d at 739. Due to the great deviations between the original charge and the charges now being used in various circuits, the charge has often been criticized and discredited in some circuits. *United States v. Williams*, 447 F.2d 894, 899 (5th Cir. 1971). As Justice Coleman stated:

> I realize that as long as *Allen v. United States*, . . stands it is our duty to follow it. I entertain the thought that if it were submitted to the Supreme Court today the result might not be the same as it was in 1896. I cannot see that the qualifications, reservations, and escape clauses customarily used in modern versions of the charge save it from being what it is, and what the jury believes it to be, a direct appeal from the Bench for a verdict.

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conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression upon the minds of so many men, equally honest, equally intelligent with himself. If, upon the other hand, the majority were for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was no concurred in by the majority.

Thaggard, 354 F.2d at 739 (Coleman dissenting).

III.

THIS COURT SHOULD OVERRULE THE CONVICTION OF MICHAEL L. HINTON BECAUSE THE VERDICT WAS THE PRODUCT OF THE COERCIVE USE OF THE ALLEN CHARGE WHICH THEREFORE VIOLATED THE CONSTITUTIONAL GUARANTEED RIGHT TO A FAIR TRIAL

The coercive tendency of the Allen charge violates the Constitutional guaranteed trial by jury. That is, once the jury has retired to consider of its verdict it should not be subjected to so much as the appearance of any influence from any source for the purpose of producing a verdict. The jurors should be left to the unhampered expression of their own consciences, independently arrive at. *Thaggard* 354 F.2d at 741 (Coleman, concurring).

The Allen charge causes more trouble in the administration of justice than it is worth. *Andrews v. United*

States, 309 F.2d 127, 129 (1962) (Wisdom, dissenting). Its time saving merits in the district court are more than nullified by the complications it cause on appeal when the reviewing court must determine whether in the circumstances of a particular case the trial judge applied the charge properly in substances and in timing. *Id.* at 129.

The Arizona Supreme Court early on had enough of the Allen charge. In *State v. Thomas*, the court stated:

> When and wherever its use is called into question it must stand or fall upon the facts and circumstances of each particular case. It has given, and we believe each use will give us, harassment and distress in the administration of justice. No rule of thumb can circumscribe definite bounds of when and where, or under what circumstances it should be given or refused.
>
> It now appears that its continued use will result in an endless chain of decisions, each link thereof tempered and forged with varying facts and

> circumstances and welded with ever-changing personalities of the appellate court. This is not in keeping with sound justice and the preservation of human liberties and security. We are convinced that the evils far outweigh the benefits, and decree that its use shall no longer be tolerated and approved by this court. *Thomas*, 342 F.2d at 200.

Most of the reported case law involving coercion turns upon the permissible content of various versions of the Allen charge. *See e.g., U.S. v. Vachon*, 869 F.2d 653 (1st Cir. 1989); *U.S. v. Fontanez*, 878 F.2d 33 (2nd Cir. 1989); *U.S. Healthcare v. Blue Cross of Gr. Philadelphia*, (3rd Cir. 1990); *U.S. v. West*, 877 F.2d 281 (4th Cir. 1989); *Edwards v. Butler*, 882 F.2d 160 (5th Cir. 1989); *Kociemba v. G.D. Searle & Co.*, 707 F.Supp 1517 (D. Minn. 1989); *U.S. v. Hernandez-Garcia*, 901 F.2d 875 (10th Cir. 1990); *U.S. v. Nickell*, 883 F.2d 824 (9th Cir. 1989). The principle that jurors may not be coerced into surrendering views conscientiously held requires little citation. *See, Jenkins v. United States*, 380 U.S. 445 (1965). The requirement of a

unanimous verdict means that the verdict must be that of each member of the jury. Therefore, a verdict that is not that of each juror, but simply the product of coercion, is not a true verdict. *See, United States v. Martin*, 756 F.2d 323, 326 (4th Cir. 1985). Accordingly, the trial court may not employ coercive measure to obtain a verdict, and if the verdict is the product of coercion, it cannot stand.

IV

IN REFUSING TO SUPPRESS EVIDENCE OF AN INTERCEPTED WIRE COMMUNICATION IN THE ABSENCE OF ANY EFFORT TO MINIMIZE, MICHAEL L. HINTON'S FOURTH AMENDMENT RIGHT OF THE UNITED STATES CONSTITUTION WAS VIOLATED

Petitioner clearly had standing to seek the suppression of improperly seized wire communications. 18 U.S.C. § 2518(10)(a) provides:

> Any aggrieved person in any trial . . . before any court . . . may move to suppress the contents of any

wire or oral communication intercepted pursuant to this chapter, or evidence derived therefrom, on the grounds that:

(i) the communication was unlawfully intercepted;

(ii) the order of the authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

In addition, 18 U.S.C. § 2518 (5) requires that:

Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communication not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days. (Emphasis added).

The court's order required that the wiretap "be conducted in such as (sic) way as to minimize the interception of communications not otherwise subject to interception . . ." App. 14. The purpose of the minimization provision is to prevent improper invasion of the right to privacy and to curtail the indiscriminate seizure of conversations. *United States v. Clerkley*, 556 F.2d 709, 715 (4th Cir. 1977).

In determining whether proper efforts have been undertaken to minimize interception of communications not otherwise subject to interception, a court must objectively assess the agents' actions in light of the facts and circumstances confronting them at the time of interception. This determination must be made on a case by case bases. *Scott v. United States*, 436 U.S. 128 (1978). Such an analysis in the present case demonstrates that the DEA agents who conducted this wiretap interception did not make reasonable efforts to minimize conversations that were wholly unrelated to the investigation at issue.

The complete lack or reasonable minimization efforts is

demonstrated by the statistical analysis of the intercept activities. App. 16-18. 6,453 calls were intercepted in the course of the investigation. Of that number, only 742, or approximately 11.5 percent, were minimized. Only 414 of the total number of calls, or approximately 6.4 percent were deemed pertinent, and only 244 or approximately 3.8 percent of the total calls were deemed questionable. Thus, it would appear that 78.3 percent of the calls intercepted in this wiretap were not pertinent, were not even questionable, and were nevertheless not minimized in any way.

The statistics demonstrate the lack of a minimization effort in another way. The percentage of calls minimized does not change significantly from the beginning days of the wiretap to the concluding days. During the latter part of the wiretap, the agents were engaging in such sophisticated stratagems as "tickling the wire" by the issuance of subpoenas and target letter to evoke incriminating discussion by the conspiracy's participants. [T.389] By that time, it could hardly be claimed that the agents were not aware of the conspirators' identities.

Nonetheless, this knowledge did not produce any appreciable increase in the percentage of calls minimized.

RELIEF REQUESTED AND CONCLUSION

For the various reasons set forth above, this Petition for Certiorari to the United States Supreme Court Should be granted to answer the four questions presented by the Petitioner.

Respectfully Submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 90-5079

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

BARRY JOHNSON, a/k/a William Brown,

Defendant-Appellant.

No. 90-5080

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MICHAEL LOVELL HINTON,

Defendant-Appellant.

No. 90-5081

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DERRICK SCOTT MITCHELL,

Defendant-Appellant.

No 90-5082

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

HESS VICTOR BRANCH,

Defendant-Appellant.

Appeals from the United States District Court for the District of Maryland, at Baltimore. Frederic N. Smalkin, District Judge. (CR-89-434-S)

Argued: April 12, 1991 Decided: June 17, 1991

Before MURNAGHAN, Circuit Judge, CHAPMAN, Senior Circuit Judge, and MICHAEL, United States District Judge for the Western District of Virginia, sitting by designation.

Affirmed in part, vacated and remanded by unpublished per

curiam opinion.

ARGUED: W. Michel Pierson, Baltimore, Maryland, for Appellant Mitchell; Robert T. Durkin, Jr., Baltimore, Maryland, for Appellant Hinton. Harvey Ellis Eisenberg, Assistant United States Attorney, Coordinator, ORGANIZED CRIME DRUG ENFORCEMENT TASK FORCE, Baltimore, Maryland, for Appelle. **ONE BRIEF:** Andrew Joseph Burns, Baltimore, Maryland, for Appellant Johnson; Joseph S. Longo, Jr., Baltimore, Maryland, for Appellant Branch. Breckinridge L. Willcox, United States Attorney, Baltimore, Maryland, for Appellee.

PER CURIAM:

Seventeen individuals were indicted for conspiracy to possess with intent to distribute cocaine in violation of 20 U.S.C. § 846. A number of these persons were charged in the same indictment with violating other federal narcotics laws as well. One of these individuals remains a fugitive and has not been brought to trial. Shortly before trial, most of the alleged conspirators entered into plea agreements with the government which were accepted by the court. During trial, two of the remaining defendants entered guilty pleas. When the trial was concluded, only the appellants Barry Johnson, Michael Hinton and Derrick Mitchell remained as defendants, and the jury found them guilty of conspiracy to possess cocaine with intent to distribute.

Johnson, Hinton and Mitchell appeal their convictions claiming that the jury verdict was coerced by the actions of the trial judge, that it was error not to suppress evidence obtained by the use of a court approved telephone wiretap, and that the trial judge should have granted a mistrial after a government

witness testified that Barry Johnson had used heroin in his presence and had referred to Johnson as a violent person with a criminal record. In addition, appellants Mitchell and Johnson appeal their sentences, claiming error in the findings of the district judge as to the amount of cocaine that was involved in the conspiracy and the amount that the appellants could reasonably have foreseen as being involved in the conspiracy. Finally, Hess Victor Branch, who entered a plea of guilty, appeals his sentence claiming an incorrect application of the guidelines, because his offense level was increased by two as a result of the alleged use of juveniles by the drug conspiracy. With the exception of Mitchell's sentence, we find no merit to any of these claims. Accordingly, we affirm the judgments of the district court as to all appellants except Derrick Mitchell. As to Mitchell we affirm his conviction, but we find that there are not sufficient findings to support the conclusion that he knew a major drug operation would involve more than 15 kilograms of cocaine; therefore, his sentence is vacated and his case is remanded for resentencing.

I.

In November 1988, law enforcement officers seized five kilos of cocaine at the Baltimore-Washington International Airport. This cocaine had arrived from Long Beach, California. The drugs were seized from one of the original defendants in this case. Further investigation revealed a large drug conspiracy and resulted in the indictments of seventeen persons, including the four appellants. During the course of the investigation, DEA agents obtained authorization from a United States District Judge in Baltimore for a 30 day Title III intercept on this telephone number (301)974-8263. Electron eavesdropping on this telephone began on October 4, 1989, and as a result of an extension granted by the district court, the intercept lasted 48 days. The intercepts revealed extensive use of the telephone in furtherance of the sale of drugs and also extensive pager and beeper activity from the targeted telephone. The wiretap resulted in considerable evidence of drug distribution by members of the conspiracy, and tapes of the intercepted conversations were admitted into evidence. A large portion of

the evidence of the conspiracy and the participants therein and their activities resulted from the testimony of a Maryland undercover detective, who had infiltrated the conspiracy.

There is no claim that the evidence was not sufficient to sustain the convictions, so a further recitation of the facts is not required at this point. Facts necessary to an understanding of our conclusions are set forth as required.

II.

Appellants Johnson, Hinton and Mitchell rely upon *Jenkins v. United States*, 380 U.S. 445 (1965), to argue that the jury verdict was coerced by the trial judge, and therefore it cannot stand. However, the judge's actions presently as issue are not similar to those in *Jenkins*. The jury in *Jenkins* had been deliberating just over two hours when it sent a note to the judge advising him that it had been unable to reach a verdict "because of insufficient evidence." The judge thereupon recalled the jury to the courtroom and in the course of his response stated that "you have got to reach a decision in this case." The jury then returned a verdict of guilty on one court and not guilty on

another. The Supreme Court reversed and remanded for a new trial, stating that "[u]pon review of the record, we concluded that in its context and under the circumstances the judge's statement had the coercive effect attributed to it." *Id.* at 446.

When we view the actions of the trial judge in context and under all the circumstances presented, we must conclude that the trial judge did not coerce the jury during its deliberations. From the record it is clear that the judge acted in an appropriate manner and within his discretionary authority during his contacts with the jury while it was deliberating.

The case went to the jury on the fourth day of trial, Friday, May 4, 1990 at 2:38 p.m., the jury retired to deliberate, and at 5:05 p.m., the court dismissed the jury for the weekend. The jury returned on Monday, May 7, 1990 and resumed its deliberations at approximately 9:55 a.m. At 2:45 p.m., on the same date, the court received a note from the jury stating "What happens if we have reached a verdict on two defendants but are deadlocked about the third?"

The court discussed with the attorneys several

alternatives for responding to the jury's question. The judge then recalled the jury and gave the following instructions:

> We have got a note from you that says, "What happens if we have reached a verdict on two defendants but are deadlocked about the third?" Federal law gives you the right at any time during your deliberations to return a verdict or verdicts with respect to a defendant or those defendants as to who you have agreed. I would tell you that any such what is called a partial verdict is not subject to revision. You cannot change your mind about that as you continue to deliberate on any remaining issues in the case. It is the desire of the court and all parties that, if possible, you return a verdict on all defendants if you can do so without violating your individual conscience; but, as I have told you, you may return a verdict as to less than one -- less than all defendants if you wish to do that; and what I

am going to do now is ask you to go back in the jury room and decide whether you wish to follow that procedure or if you simply wish to continue your deliberations until you have reached a unanimous verdict as to all of the defendants.

Remember what I said, that, once you have returned a verdict as to any particular defendant, that is not subject to revision, that is final.

Okay.

So, you all go ahead back in there and take your time. Whatever you want to do in response to what I have told you, you are the ones who decide how you wish to handle that.

If you have any further communications, just tap on the door to the Marshal, as you have done.

Appellant Mitchell's attorney took exception to the instruction and claimed that it was coercive.

At 2:35 p.m. on the same day, the jury forwarded a note to the judge which stated: "Wiil you accept a deadlock as a

verdict?" The court, over defendants' objection, gave the instruction set forth in footnote 7 of *United States v. Sawyers*, 423 F.2d 1335 (4th Cir. 1970). The jury resumed deliberations at 3:38 p.m. and returned a verdict of guilty as to all defendants at 5:45 p.m. on the same day.

When we view this record in its context and under all of the circumstances, as *Jenkins* directs, it is obvious that the jury's verdict was not coerced by the actions of the trial judge. From the beginning, the judge was very considerate of the jury and made no effort to hurry it to a verdict. The jury had been out for just over two hours on Friday afternoon when the court recessed from the weekend and allowed the jurors to return to their homes. Many courts do not allow a jury to be in recess once the case has been submitted to it. Juries that cannot reach a verdict during normal working hours are often kept in deliberation until late at night or overnight or over the weekend. When the jury returned on Monday and began further deliberations, the trial judge made no effort to hurry or coerce the jurors into a decision. The court's response to the

first note of inquiry from the jury followed the language of instruction 9-8 of *Sand, Modern Federal Jury Instructions* and also the requirements of Federal Rule of Criminal Procedure 31(b).

Appellants claim to reach a verdict on all defendants had a coercive effect. However, a complete reading of the instruction make it clear that this desire was conditioned upon the ability of the individual jurors to reach an agreement "without violating your individual conscience." In answer to the jury's second inquire, the judge gave an instruction that is commonly know as an *Allen* charge. This name is derived from *Allen v. United States*, 164 U.S. 492 (1896). We have approved a version of this charge as adopted by the Judicial Conference of the United States and set forth in footnote 7 of *United States v. Sawyers*, 423 F.2d 1335, 1342 (4th Cir. 1970).

The trial judge gave the jury the opportunity to return a verdict as to some of the defendants and did not require a verdict as to all of the defendants. After receiving the second charge on Monday afternoon, the jury retired at 3:38 p.m. and

returned the guilty verdicts as to all defendants at 5:45 p.m. The two hours of additional deliberations does not indicate that the charge had a coercive effect. In *United States v. Martin*, 756 F.2d 323 (4th Cir. 1985) (*en banc*), we held that the lapse of more than two hours between receiving an *Allen*-type charge and reaching a verdict indicated the charge had no coercive effect. When the jury deliberations and the court's additional instructions are viewed in context, the judge's handling of the jury's inquiries by giving the additional instructions did not have a coercive effect upon the jury's verdict.

IV.

Pursuant to 18 U.S.C. § 2518 (10)(a), the defendants moved to suppress the evidence obtained by the telephone wiretap. Their motion was denied, but they continue to argue that the intercept did not comply with the district court's order requiring the wiretap to be conducted as to "minimize the interception of communications not otherwise subject to interception . . ." and did not comply with 18 U.S.C. § 2518 (5), which requires that intercepts "shall be conducted in such a way

as to minimize the interception of communications not otherwise subject to interception under this chapter."

The district court received affidavits from the parties, a copy of the minimization instructions given by the United States Attorney to the officers conducting the intercept, an analysis of the intercept activities, and heard argument on the motion to suppress. Prior to trial, a written order was filed denying the motion to suppress. The district court made findings of fact that the United States had made the *prima facie* showing of its reasonable efforts to minimize the intercept of innocent communications and that pursuant to *United States v. Armocida*, 515 F.2d 29, 49 (3rd Cir.), *cert. denied sub nom. Gazal v. United States,* 423 U.S. 858 (1975), the burden had shifted to the defendants to demonstrate that there were more effective alternate procedures for minimization which would permit the government to achieve its purpose. The district court found that the defendants offered only criticism of the method employed and failed to suggest any effective alternative.

The minimization requirement does not leave all

innocent communications unheard. Unnecessary intrusions are to be reduced as much as possible under the circumstances presented. Efforts at minimization must be reasonable under the circumstances and reviewed on a case by case basis when testing compliance. We indicted the rule for this circuit in *United States v. Clerkley* 556 F.2d 709, (4th Cir. 1977), *cert. denied sub nom. Genco v. United States*, 436 U.S. 930 (1978), as follows:

> In analyzing a given case, the federal courts have considered three principal factors: (1) the nature and scope of the alleged criminal enterprise; (2) the government's reasonable expectation as to the content of, and parties to, the conversations; and (3) the degree of judicial supervision while the wiretap order is being executed.

Id. at 716.

While *Clerkley* involved the investigation of illegal gambling, these same factors are applicable to a narcotics

conspiracy. In *Clerkley* we observed:

> When law enforcement officials are confronted with a large, far-flung and on-going criminal activity involving multiple parties, they are afforded great latitude in conducting wiretaps. The Seventh Circuit, in considering a drug conspiracy, held that
>
> > [l]arge and sophisticated narcotics conspiracies may justify considerably more interception than would a single criminal episode. This is especially so where, as here, the judicially approved purpose of the wiretap is not so much to incriminate the known person whose phone is tapped as to learn the identity of far-flung conspirators and to delineate the contours of the conspiracy

IV.

We find no merit to appellants' argument that the trial judge abused his discretion in refusing to grant a mistrial after

undercover Officer Toatley testified that appellant Johnson had used heroin in his presence and alter referred to Johnson as a violent person who had a criminal record. These responses were invited by the persistent efforts of defense counsel, and they were followed by cautionary instructions from the court to the jury.

While cross-examining Officer Toatley, the defendants' attorneys tried to convince the jury that the defendants knew that Toatley was an undercover agent and that they were merely stringing him along with the intention of robbing him of his cocaine purchase money when circumstances permitted. When Toatley was asked if Johnson knew that he was an undercover officer, he denied this without elaboration. The attorney persisted in this line of questioning, asking for reasons supporting Toatleys's opinion. The officer answered that Johnson had never stated that he thought Toatley was a police officer and that Johnson was going through with the cocaine deal. Counsel pressed the witness again and asked for the basis of his belief that Johnson was not aware that he was a police

officer. Toatley answered that Johnson had used heroin in his presence and Toatley had not arrested him, so it was doubtful that Johnson thought he was a police officer. The trial court granted a motion to strike and gave a curative instruction, but stated that at the time answer was responsive to the question.

Cross-examination continued with the defense counsel trying to elicit some type of concession from Toatley that Johnson must have known he was an undercover agent. Counsel finally asked Toatley why it was necessary for other undercover agents to accompany him on a flight from Baltimore to California for his protection. Again the response of Toatley was invited by defense counsel's question, and Toatley responded that the other officers were there because "from his [Johnson's] record we knew he was a violent person." A motion to strike was granted and a second curative instruction was given to the jury, although it was not necessary. When counsel insists on pursuing a line of questioning that has thus far proved fruitless and that has already produced one damaging answer and a curative instruction to the jury, he returns to this line of

questioning at his peril. As a result, he will not be heard to complain of an abuse of discretion by the district court, which graciously gave him a second curative instruction, but denied his motion for a mistrial.

There is no necessity to review this episode on a harmless error basis because there was no error and no abuse of discretion by the trial judge in the manner in which he handled the two responses by Officer Toatley. The witness had answered the same question several times in a harmless way, and when pressed he finally responded with what he really thought. A defendant may not invite such a response and attempt to use it as a basis for a mistrial.

V.

Appellants Johnson and Mitchell claim that the sentencing judge erred in finding that it was reasonably foreseeable to them that the drug conspiracy in which they were engaged involved at least 15 kilograms of cocaine. The findings of fact by the district court at sentencing must be accepted by us, unless they are clearly erroneous, and the standard of proof

on disputed factual issues at sentencing is a preponderance of the evidence. *United States v. Vinson*, 886 F.2d 740, 742 (4th Cir. 1989), *cert. denied*, 110 S.Ct. 878 (1990). At the sentencing of both Johnson and Mitchell, the district court stated that it found by a preponderance of evidence that had been presented at the trial and at the sentencing hearings that it was reasonably foreseeable to Johnson and to Mitchell that the drug conspiracy involved at least 15 kilograms of cocaine.

The significance of 15 kilograms is set forth in the United States Sentencing Guidelines, which establish a base offense level of 34 for drug trafficking or possession with intent to distribute at least 15 kilograms of cocaine. *See* U.S.S.G. § 2D1.1(a)(3). Section 2D1.4 provides that the base offense level of a defendant convicted of conspiracy involving a controlled substance "shall be the same as if the object of the conspiracy or attempt had been completed."

In *Vinson* we stated:

> According to the Commentary to Guidelines § 2D1.4, a defendant convicted of

> conspiracy shall be sentenced "only on the basis of [his] conduct or the conduct of co-co-conspirators in furtherance of the conspiracy that was know to the defendant or was reasonably foreseeable." Since the base offense level in drug cases, both conspiracy and otherwise, is directly determined by the type and amount of drugs involved, the determination of the foreseeability of the extent of the overall conspiracy is often critical. It is clearly a question of fact which will only be overturned on appeal if it is clearly erroneous.

Vinson, 886 F.2d at 742. Therefore, we must examine the record to determine if there is evidence to support the district court's finding that it was "reasonably foreseeable" to Johnson and/or Mitchell that the conspiracy involved at least 15 kilograms of cocaine.

A.

Barry Johnson argues that the evidence reflects that he

conspired only with Tracy Brown, the cocaine source in California, that none of the intercepted telephone calls were either to him or from him, and that during the time that Officer Toatley was associated with Johnson there was no reference to co-conspirators Mitchell, Hinton and Stansbury. He claimed at sentencing that he handled less than five kilograms of cocaine. He also argued that only his association with Tracy Brown and the drugs that they handled could be considered in determining drug weight. Although Johnson acknowledged telling Officer Toatley that he had smuggled over ten kilograms of cocaine, he claims this statement should be disregarded because he was simply "bragging," and this statement was not corroborated by other evidence. Johnson also claims that he was not in the conspiracy prior to July 1989.

The district court had information from a number of sources relating to Johnson's involvement in the conspiracy and the amount of drugs that he could have reasonably foreseen as being involved. In addition to the trial testimony in Johnson's case, the court had accepted the guilty pleas of the thirteen co-

defendants and the factual statements accompanying these pleas. The court also had the presentence investigation report prepared by the Probation Office on Johnson, and the court conducted a sentencing hearing prior to making its findings of fact as to Johnson's involvement and what he could have reasonably foreseen.

At sentencing the court found:

> The Court finds by a preponderance of the evidence, based on the testimony at trial and the evidence adduced here at the sentencing hearing, that it was reasonably foreseeable to this defendant that the conspiracy would reasonably involved at least 15 kilograms. I base that finding, as I said, on the evidence at trial.
>
> The calculation of the drug amounts, setting the base offense level in conspiracy cases is not dependent on how much actually passes through the defendant's hands or how much the defendant physically saw. It's dependent on the

> defendant's activities and his position to be in a position to know what was going on.
>
> I find here, based on the relationship between the defendant, Barry Johnson, and the kingpin of this conspiracy and the many trips to California, despite the way Mr. Johnson seeks to characterize them, that these circumstances, given his involvement in this drug conspiracy, is enough to warrant by a preponderance of the evidence and it so does warrant a finding of a base offense level of 34.

The July 1989 trip to California was made by Johnson, Tina Brown, Louis Edwards and Officer Toatley to purchase three kilograms of cocaine from Tracy Brown. Prior to this trip, Johnson had told Toatley that he had previously received approximately ten kilograms of cocaine from Tracy Brown and that he had delivered approximately $100,000 to Tracy Brown in California. This was confirmed by Tracy Brown at the trial. Brown gave conflicting testimony as to the amount of cocaine

he had provided to Johnson. On direct examination, he stated that there were five or six trips to California for cocaine and that the amounts involved one-half to one kilogram. On cross-examination he stated that the first sale was one-half kilogram and that thereafter the amounts grew to one to two kilograms for each trip.

Although Johnson would have us limit his contracts to Tracy Brown, the record reflects that he knew and dealt with at least four other co-conspirators, two of whom accompanied him on the trip to California in July 1989. The court was aware that Tracy Brown was Johnson's cousin and that in July 1989 Johnson was the person who arranged purchases from Tracy Brown. Johnson was also aware that co-conspirator Raymond Watts had $40,000 to pay Tracy Brown, so he was aware of Watts' involvement with the cocaine supplier.

It is obvious that appellant Johnson's role was not as minor as he contends, and there is a preponderance of evidence to support the trial judge's finding that Johnson could reasonably foresee that cocaine in excess of 15 kilograms was

involved in the conspiracy during the time that he was a member.

B.

Appellant Mitchell was found to know or should have reasonably foreseen that the conspiracy involved at least 15 kilograms of cocaine, and he was given a two level reduction as a minor participant. However, he claims that there are no facts from which the court could infer that he had knowledge or should have reasonably foreseen that such a quantity of drugs was involved.

The district court considered the evidence from the trial, the presentence investigation report on Mitchell, the prior sentencing hearings and the sentencing hearing of Mitchell. The evidence showed that Mitchell leased seven telephone pagers or beepers. These instruments were leased at various times over a period of approximately six months. It is common knowledge that pagers are used in the sale and distribution of illegal drugs. One of these pagers was used by co-conspirators Stansbury, and during one 60-day period this pager was activated

2,050 times. Additional charges are made for calls in excess of 200 per month, so Mitchell was aware that Stansbury had used his pager extensively and aware that Stansbury was a distributor of cocaine.

There was no direct evidence that one of the pagers was used or carried by Mitchell, except that after he was arrested he returned one of the instruments to the leasing company. Mitchell was involved in one direct sale of at least one quarter kilogram of cocaine in Annapolis, Maryland in either October or November 1989.

In finding that a base offense level of 34 was appropriate for Mitchell, the court stated:

> The Court finds that by a preponderance of the evidence the base offense level for this defendant should be 34. The reason I find that is because the question is not how much he had in his person possession, the question is not how he directly facilitated or dealt. The question is what amount should be reasonably foreseeable

to the defendant.

As i view 2D1.4 and 3B1.3 and 1.4 and all of the other hodgepodge of guidelines that goes into calculating one of these drug conspiracy sentences, here the defendant was not -- even though he might have been a minor participant, the question of whether he was a minor participant or not does not bear directly upon the degree of activity involving drugs that is reasonably foreseeable to him, and I find by a preponderance of the evidence that he either personally leased or is responsible for leasing a large number of beepers over a long period of time, which is indicative to somebody, except someone who had\s willfully blinded himself to it, that he is involved in a major drug operation, and a major drug operation would involved more than 15 kilograms, as charged by the government, or at least 15 kilograms.

> Over this particular period of time he himself was involved in one deal that involved more than a coupe of ounces, involved at least a quarter of a kilogram of drugs; and, given the extent of this conspiracy and the fact that this defendant was to simply a courier but was, as I find by a preponderance, in a position where he knew or reasonably should have known that it was an extensive and large conspiracy, 34 is the proper offense level. I find that by a preponderance of the evidence as a matter of fact.

A sentence should be imposed only on the basis of the defendant's conduct, or in a conspiracy, the conduct of co-conspirators that was known to the defendant or reasonably foreseeable by him. The only evidence of Mitchell's sale of cocaine was the one quarter of a kilogram sold in Annapolis in the fall of 1989. It is obvious from the record that Mitchell leased at various times over a period of six months seven pagers

or beepers and these instruments were used by other co-conspirators. The seven pagers were not all leased at the same time. The number of pagers grew from one to a total of seven over a six month span of time. Mitchell claims that he was involved in "free enterprise," the leasing and subleasing of pagers. The record supports a conclusion that he was aware of the illegal activities of Stansbury and others in the conspiracy, but the difficult question remains as to what amount of drugs he could reasonably have foreseen as passing through the conspiracy. The district court found that his leasing of the beepers over a long period of time was indicative that he was involved in a major drug operation, and then concluded that a major drug operation would involved more than 15 kilograms. Mitchell contends that this is a double inference drawn from the one fact of his leasing seven pagers. First, he claims that there is an inference from the number of pagers leased and the time for which they were leased that he knew that he was involved in a major drug operation. Actually, this is not an inference because he did know that some of the beepers, particularly the

one furnished to Stansbury, were being used in furtherance of the drug conspiracy. However, the second claim of inference presents a more troubling issue. The district court found that Mitchell knew from the number of beepers that he was involved in a major drug operation and "that a major drug operation would involved more than 15 kilograms of cocaine." Technically, this is not an inference built upon an inference, because there is evidence of his knowledge of the use of some of the beepers to distribute cocaine. However, without more evidence than appears on the present record, there is nothing to support the inference that Mitchell should know "a major drug operation would involved more than 15 kilograms." Without more detailed findings of fact, we find that this inference is insupportable, and the sentence of Mitchell must be vacated and his case remanded for resentencing.

VII.

We find not merit to Hess Victor Branch's appeal. Branch entered a plea of guilty and as a result of a plea agreement, which he and his attorneys negotiated, stipulated to

and refused to withdraw when offered an opportunity to do so by the district court. In paragraph 5(d) of the plea agreement, it is stipulated that an upward adjustment of two levels is appropriate pursuant to U.S.S.G. 5K2.0 because of the use of juveniles by the conspiracy. The agreement states that use of juveniles ia an aggravating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines. Branch makes a convoluted argument that the agreement does not contain a departure stipulation which is unpersuasive. He freely and voluntarily entered into the plea agreement, he was aware of its terms, and he was given the opportunity to withdraw it. This court will not aid him in his effort to avoid the obligations of the agreement.

The sentence of Derrick Mitchell is vacated and his case is remanded for resentencing. All convictions are affirmed, as are the sentence of the other appellants.

AFFIRMED IN PART; MITHCELL'S SENTENCE IS VACATED AND REMANDED FOR RESENTENCING

United States District Court

_____ District of Maryland

UNITED STATES OF AMERICA

V. Judgment Including Sentence
Under The Sentencing Reform Act

MICHAEL LOVELL HINTON

Cased Number S-89-0434

Harvey E. Eisenberg & Barbara S. Skalla
Attorney for United States

Robert T. Durkin, Jr., (Apptd)
Defendant's Attorney

THE DEFENDANT:

pleaded guilty to count(s)_____
was found guilty on count(s) One (1) after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Count Number(s)
21:846	Conspiracy to possess with intent to distr. Cocaine, a Sch. II CS	1

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the

Sentencing Reform Act of 1984.

The defendant has been found not guilty on count(s) _____ and is discharged as to such count(s).

Count(s)_____(is)(are) dismissed on the motion of the United States.

The mandatory special assessment is included in the portion of this Judgment that imposes a fine.

It is ordered that the defendant shall pay to the United States a special assessment of $ 50.00 , which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's Soc. Sec. Number:
217-86-2318 July 23, 1990
Date of Imposition of Sentence

Defendant's mailing address:
245 A Boxwood Rd., Apt 202 _____
Signature of Judicial Officer
Annapolis, Maryland 21403 Frederic N. Smalkin, Judge U.S. Dist. Court

Name & Title of Judicial Officer

Defendant's residence address:
S/A July 24, 1990
Date

Defendant: MICHAEL LOVELL HINTON
Case Number: S-89-0434

IMPRISONMENT

The defendant is hereby committed to the custody of the United Sates Bureau of Prisons to be imprisoned for a term of

151 months,

The Court makes the following recommendations to the Bureau of Prisons: That defendant be placed in an institution near the Balto/Wash. Metro are.

The defendant is remanded to the custody of the United States Marshal.

The defendant shall surrender to the United States Marshal for this district, after 9/15/90,

at _____ a.m. / p.m. on _____.

as notified by the Marshal, Defendant shall be on home monitoring pending surrender to the Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons

before 2 p.m. on _____.

as notified by the United States Marshal.

as notified by the Probation Office.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at

_____, with a certified copy of this Judgment.

_____

United States Marshal

_____

Deputy Marshal

Defendant: MICHAEL LOVELL HINTON
Case Number: S-89-0434

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of Five (5) Years

While on supervised released, the defendant shall not commit another Federal, state, or local crime and shall comply with the standard conditions that have been adopted by this court (set forth on the following page). If this judgment imposes a restitution obligation, it shall be a condition of supervised released that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

IN THE MATTER OF THE :

APPLICATION OF THE:

UNITED STATES FOR AN:

ORDER AUTHORIZING: MISC. NO. 3876

THE INTERCEPTION OF:

WIRE COMMUNICATIONS :

ORDER AUTHORIZING INTERCEPTION

OF WIRE COMMUNICATIONS

Application under oath having been made before me by Harvey Ellis Eisenberg, an "investigative or law enforcement officer of the United States" as defined in Section 2510 of Title 18 of the United States Code, for an order authorizing the interception of wire communications pursuant to Section 2518 of Title 18 of the United States Code, and full consideration having been given to the matters set forth therein, the court finds:

A. There is probable cause to believe that Troy Donyel

Stansbury, Hess Victor Branch, Desi Coates, Kevin Ronald Adams, Tracy Tilghman Brown and others as yet unknown have committed and are committing offenses involving the distribution of controlled substances, conspiracy to do same and the use of a communication facility to commit violations of Title 21 of the United States Code, in violation of Sections 841, 843 and 846 of Title 21 of the United States Code.

B. There is probable cause to believe that particular wire communications concerning these offenses will be obtained through the interception for which authorization is herewith applied. In particular, these wire communications will concern the distribution of controlled substances, conspiracy to do same and the use of a communication facility to commit violations of Title 21 of the United State Code.

C. Normal investigative procedures have been tried and failed, reasonably appear unlikely to succeed if continued, reasonably appear unlikely to succeed if tried, or are too dangerous.

D. There is probable cause to believe that the

telephone subscribed to by Reginald Simms and Reginald Simms, Sr., located at 1150 Madison Street, Apartment S-1, Annapolis, Maryland, and bearing telephone number 301-974-8263, has been and is being used by Troy Donyel Stansbury, Hess Victor Branch, Desi Coates, Kevin Ronald Adams, Tracy Tilghman Brown and others as yet unknown in connection with the commission of the above-described offenses.

WHEREFORE, IT IS HEREBY ORDERED that the Drug Enforcement Administration (DEA) and DEA-deputized officers of the Maryland State Police and the Anne Arundel County Police Department are authorized, pursuant to an application authorized by an appropriate official of the Criminal Division, United States Department of Justice, pursuant to the power delegated to that official by special designation of the Attorney General under authority vested in him by Section 2516 of the Title 18 of the United States Code: to intercept wire communications from Troy Donyel Stansbury, Hess Victor Branch, Desi Coates, Kevin Ronald Adams, Tracy Tilghman Brown and others as yet unknown concerning the above-

described offenses to and from the telephone subscribed to by Reginald Simms and Reginald Simms, Sr., and bearing telephone number 301-974-8263. Such interception shall not automatically terminate when the type of communications described in paragraph B have first been obtained but shall continue until communications are intercepted that reveal the manner in which Troy Donyel Stansbury, Hess Victor Branch, Desi Coates, Kevin Ronald Adams, Tracy Tilghman Brown and others as yet unknown participate in the specified offenses and that reveal the identities of their co-conspirators, their places of operation, and the nature of the conspiracy involved therein, or for a period of thirty (30) days, whichever is earlier; pursuant to Section 2518(5) of Title 18 of the United States Code, the time set forth in the order shall run from the earlier of the day on which the investigative or law enforcement officer first beings to conduct the interception or ten (10) days from the date of this order.

PROVIDING THAT, this authorization to intercept wire communications shall be executed as soon as practicable

after the signing of this order and shall be conducted in such as way as to minimize the interception of communications not otherwise subject to interception under Chapter 119 of Title 18 of the United States Code, and must terminate upon attainment of the authorized objective or, in any event, at the end of thirty (30) days measured from the earlier of the day on which the investigative or law enforcement officer first begins to conduct the interception or ten (10) days from the date of this order.

PROVIDING ALSO, that Harvey Ellis Eisenberg shall provide the court with a report on or about fifteen (15) days (or on or about the next court day following the fifteen (15) days period) following the date of this order showing what progress has been made toward achievement of the authorized objective and the need for continued interception.

IT IS FURTHER ORDERED that two (2) certified copies of the order shall be provided by the Clerk of this Court to the Office of the United States Attorney for the District of Maryland.

October 4, 1989
Date

United States District Judge

WIRETAP LOG ANALYSIS

	Total	DEA Note			Tynea		Maria	
Date	Calls	P	O	Minimized	Total	Min.	Total	Min.
10/5/89	168	8	4	4	14	0	17	0
10/6/89	195	5	9	21	24	7	17	8
10/7/89	132	20	3	12	18	1	17	2
10/8/89	218	39	3	19	26	4	18	10
10/9/89	160	11	14	10	20	2	19	5
10/10/89	89	4	2	12	6	2	31	5
10/11/89	98	1	2	10	3	1	40	3
10/12/89	141	6	8	15	28	6	27	3
10/13/89	139	8	9	12	15	3	18	6
10/14/89	243	24	5	22	15	6	32	10
10/15/89	109	13	4	11	7	2	10	4
10/16/89	100	15	0	5	15	3	13	1
10/17/89	116	4	4	9	23	3	17	4
10/18/89	121	19	2	18	23	5	18	8
10/19/89	137	7	13	19	17	6	38	15

10/20/89	186	2	5	13	22	4	51	10
10/21/89	152	5	1	18	11	0	34	0
10/22/89	162	3	1	20	14	0	23	0
10/23/89	251	4	1	14	11	4	26	12
10/24/89	159	3	1	15	12	2	33	7
10/25/89	147	2	5	8	12	2	30	5
10/26/89	176	3	3	14	10	4	12	8
10/27/89	161	3	1	8	17	2	6	5
10/28/89	113	6	6	21	25	8	3	1
10/29/89	114	11	8	32	11	4	21	8
10/30/89	123	1	4	12	11	3	13	7
10/31/89	119	12	9	10	13	5	21	4
11/1/89	105	8	4	16	7	4	11	8
11/2/89	84	2	8	21	11	7	15	8
11/3/89	148	3	0	6	14	5	22	4
11/4/89	117	6	2	22	12	4	11	7
11/5/89	165	8	4	26	10	4	16	7
11/6/89	103	2	2	18	5	1	14	8
11/7/89	115	2	7	18	12	6	28	9

11/8/89	111	2	1	16	15	6	25	7
11/9/89	119	18	6	24	17	8	24	14
11/10/89	167	10	9	11	13	2	62	8
11/11/89	200	18	7	24	32	13	24	9
11/12/89	179	2	9	30	16	7	47	19
11/13/89	138	10	4	19	17	7	11	4
11/14/89	94	15	4	7	6	3	7	2
11/15/89	115	22	6	17	15	6	21	10
11/16/89	107	10	6	14	7	2	17	8
11/17/89	161	1	3	18	16	5	27	8
11/18/89	176	22	12	17	11	5	17	12
11/19/89	148	12	17	28	11	5	29	19
11/20/89	42	2	6	6	3	1	13	5

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With your jury service. So, you need not respond to any such inquiry.

Do you all understand that?

(Affirmative Response)

The Court: Now, if you have anything in the jury room, go in and get it through this door and come out this door, please, so that we know that you are not in there anymore.

(Alternate Jurors Excused)

The Court: Mr. Clerk, if you would give the Exhibits, please.

All right, ladies and gentlemen, I instruct you, then, to retire to deliberate upon your verdict.

Court will stand in recess pending the return of the petit jury.

(Jury Out at 2:38 p.m.)

The Court: Thank you, counsel.

Will you all be around?

Mr. Pierson: Yes, your Honor.

Mr. Burns: Yes, your Honor.

Mr. Durkin: Yes, your Honor.

The Court: So we know where to find you on short notice.

Court stand in recess.

(Recess had at 2:40 p.m.)

The Court: I am going to bring the jury back in and let them go for the weekend, tell them to come back on Monday morning. It is five o'clock now, and we have had no communication from them.

There is a major traffic snarl here in Baltimore. Believe it or not, the city is closing down Pratt Street at 5:15, rush hour on Friday night, to accommodate the Donald Trump Bike Race. So, I don't want the jurors to be caught. They still have enough time to get out. So, I am going to go ahead and let them go for the night and tell them to get out quickly.

Ron, bring them on in.

(jury in)

The Court: Go ahead and just sit down, ladies and gentlemen. It's just about five o'clock here, and I think we are

going to let you go home for the weekend and come back on Monday morning to resume your deliberations.

Unfortunately, there is major traffic tie up. They close Pratt Street at 5:15, they are going to close it in fifteen minutes, to be accommodate the Donald Trump bike race.

So, if I were you, I would get out of town as soon as you can and preferably head west, and you'll be all right. Some people might be going east.

If you come back Monday morning, which would be the 7th, is there anybody who can't be here by, let's say, 9:30, anyone to whom that presents a problem?

(no response.)

The Court: Well, then, I am going to let you go until 9:30 on Monday morning.

Yes, sir?

A Juror: Is there a possibility to stay a little longer and let this traffic go?

The Court: No, I don't think we can do that.

The Marshal: It is going to be going until eight

o'clock tonight, your honor.

The Court: I don't think that that is a reasonable alternative.

So, we will see you on Monday morning at 9:30.

When you come into the jury room, don't start deliberating until everybody is here. When all twelve of you are here, just knock on the door, and we will bring you in court and call the roll and make sure you are all here, and then you start deliberations, but you should not deliberate unless all twelve of you are their; and, of course, it's vitally important that you not have any discussions with any outsiders or amongst yourselves from now until you meet again all together on Monday morning at 9:30.

So, you will report to the jury room by 9:30 on Monday morning to resume your deliberations, and we will see you then. Have a nice weekend.

(Thereupon, at 5:05 p.m. an adjournment was had in this matter until May 7, 1990 at 9:30 a.m.)

* * * * *

I hereby certify that the foregoing is a true and accurate transcript of the proceedings indicated.

_____

Fred Sapperstein
Chief Official Reporter

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

The United States of America	)	
	)	
VS.	)	Criminal No. S-89-0434
	)	
Tracy Tilghman Brown, *et al*	)	

May 7, 1990

Baltimore, Maryland

The Above-entitled matter was continued on trial before the Honorable Frederic N. Smalkin and a jury at 9:30 a.m.

A P P E A R A N C E S

On behalf of the Government;

Harvey E. Eisenberg, Esq.

Barbara Skalla, Esq.

On behalf of the Defendant Michael Hinton;

Robert T. Durkin, Esq.

On behalf of the Defendant Derrick Mitchell;

W. Michael Pierson, Esq.

On behalf of the Defendant Barry Johnson;

Andrew Joseph Burns, Esq.

PROCEEDINGS

The Court: Bring in the jury, please.

The record will reflect that all parties are present in person and by counsel.

(jury in)

The Court: Ladies and Gentlemen, just take your seats. As formality, we call the roll and then send you back in.

The Clerk: Ladies and Gentlemen, please respond to roll call.

(roll called.)

The Court: All right. The record reflects the jury have all answered to roll call.

We are going to send you back in to continue deliberating.

Madam Forelady, if around, oh, elevenish you decide you want some lunch menus, just tap on the door, and we will send in some lunch menus for you. It will not cost you anything. Lunch is free. So, if you anticipate that you will be here over lunch, just tap on the door at maybe 11:15 or so and ask for the

menus.

Court will recess pending the return of the petit jury.

(Jury out at 9:55 a.m.)

(2:45 p.m.)

The Court: All right, we have a note from the jury that says, "what happens if we have reached a verdict on two defendants but are deadlocked about the third?"

What I propose to do is to give the instruction essentially that is in sand, instruction 9-8, which says that it is the desire of the court and of all of the parties that, if possible, you return a verdict on all defendants, if you can do so without violating your individual conscience. However, if after conscientious deliberations you are only able to reach a verdict concerning one of the defendants, you may return a verdict concerning that defendant or those courts. Partial verdicts are not subject to revision.

Now, we have several alternative ways of proceedings here. I can simply tell them something like that.

The jury under rule 31 is entitled at any time to return

a verdict or verdicts with respect to a defendant as to whom it has agreed and says, if the jury cannot agree with respect to all, the defendant or defendants as to whom it does not agree may be tried again.

How do you all wish me to proceed on this? I will take suggestions from you.

Mr. Pierson: May we have a moment to consult, your honor.

The Court: Sure.

The Court: It is Rule 31(B).

Mr. Pierson: Your Honor, I think it is the joint feeling of those - - of those at this table that we have no objection to the court taking the verdict as to two, but each of us would prefer that your Honor not give any further instruction to the jury as to the remaining one because we feel that that might have a coercive effect.

Mr. Eisenberg: As you have probably gathered, we have a different view on this side of the room.

Your Honor, we feel that they have deliberated now

for, if my math is correct, six and a half or seven hours; and, it being three o'clock now, if your Honor would give them the charge that you suggest and let them try for another two hours, unless they indicate to you clearly that they cannot reach it.

The Court: Well, I will tell them that they have a right to do this, that they have a right to return a partial verdict and to continue deliberating on the other and that the partial verdict is not subject to revision, but they haven't indicated now that they want to return a partial verdict. They just said what happens if. So, I will answer it that way.

All right, bring them in.

(jury in)

The Court: We have got a note from you that says, "what happens if we have reached a verdict on two defendants but are deadlocked about the third?"

Federal law gives you the right at any time during your deliberations to return a verdict or verdicts with respect to a defendant or those defendants as to whom you have agreed. I would tell you that any such what is called a partial verdict is

not subject to revision. You cannot change your mind about that as you continue to deliberate on any remaining issues in the case.

It is the desire of the court and all parties that, if possible, you return a verdict on all defendants if you can do so without violating your individual conscience; but, as I told you, you may return a verdict as to less than one - - less than all defendants if you wish to do that; and what I am going to do now is ask you to go back in the jury room and decide whether you wish to follow that procedure of if you simply wish to continue your deliberations until you have reached a unanimous verdict as to all of the defendants.

Remember what I said, that, once you have returned a verdict as to any particular defendant, that is not subject to revision, that is final. Okay.

So, you all go ahead back in there and take your time. Whatever you want to do in response to what I have told you, you are the ones who decide how you wish to handle that.

If you have any further communications, just tap on

the door to the Marshal, as you have done.

All Right. Court will stand in recess pending a call.

(jury out at 3:00 p.m.)

The Court: Mr. Pierson.

Mr. Pierson: I just want to place on the record my exception to the court instructing the jury that it is the desire of the court and all parties that they reach a verdict, because I believe that is coercive.

The Court: I don't think it is coercive at all. I think that that is the standard instruction out of Sand, 9-8, and I said if you can do so without violating your individual conscience, which balances it.

All right. Your exception is noted, but I don't think -- it certainly didn't have any coercive effect. I didn't tell them to abandon any positions or to agree or whatever.

I don't think under the circumstances a full Allen charge is required. So, I didn't give one. If I were, I would use the one out of U.S. v. Sawyers, but I haven't done that because they haven't reported any particular deadlock. This is a what if

question.

So, I think that the instruction given is appropriate under the circumstances.

All right. Court stands in recess pending call.

(Recess taken from 3:05 p.m. until 3:25 p.m.)

The Court: The record will reflect that all parties are here in person and by counsel.

We have another question from the jury. It says, "will you accept a deadlock as a verdict?" Now maybe they can't decide as to anybody, in which case we will just start all over again on Monday of next week with another jury, if the government wants to reprosecute the case.

The government seems to have some difficulty here with jury trials late lately.

What I would propose to do is to give the instruction as set forth in footnote seven of United States versus Sawyers, 423 F..2d 1335 at 1342, which is the judicial conference version, which says the court informs the jury that in order to return a verdict, each juror must agree to it, that jurors have a duty to

consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment, that each juror must decide the case for himself, but only after an impartial consideration of the evidence with fellow juror, that in the course of deliberation a juror should not hesitate to reexamine his own views and change his own opinion if he thinks it is erroneous. Obviously, I will make this his or her. That each juror who finds himself in the minority shall reconsider his views in the light of the opinions of the majority, and each juror who finds himself in the majority shall give equal consideration to the views of the minority, and that no juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of fellow jurors or for the mere purpose of returning a verdict.

So, that is what I propose to do unless there is any exception to that.

Mr. Eisenberg: None from the government.

Mr. Pierson: Would your Honor consider the alternative in light of the sequence of these two notes of

inquiring of the jury if they are now telling us that they no longer have a partial verdict? I mean, I must say I don't understand it.

The Court: I don't understand it either.

Mr. Eisenberg: It can be interpreted in one of several ways, but I don't think we ought to make an inquiry of the jury at this time.

The Court: Well, I am not. I am going to read them this and send them back in.

Although the rule says that they have got the absolute right to return a partial verdict, and I will remind them of that at the beginning, and then I will read this.

Mr. Pierson: I except to it, your Honor.

The Court: Why?

Mr. Pierson: I except to the modified Allen charge, the judicial conference Allen, the watered-down Allen, or any version of Allen because I submit it is coercive.

The Court: The Fourth Circuit has repeatedly disagreed with that so long as the instruction is in a form not

stronger than that which is found in footnote 7 of the Sawyers case.

Your exception is noted. You are doing your job.

Anything else?

All right, bring them in.

The question is somewhat ambiguous, I must say

(jury in)

The Court: Be seated, ladies and gentlemen.

Your question says, "Will you accept a deadlock as a verdict?"

As I told you before, you can - - your question is a little bit ambiguous. You can return, if you wish, a unanimous verdict as to any defendant at any time you wish, either guilty or not guilty, as you vote, not subject to revision as to that verdict once it is returned.

Now, I would say that, in order to return any verdict, each of you must agree to it. You have a duty to consult with one another and to deliberate with a view to reaching an agreement if it can be done without violence to individual

judgment.

Each juror must decide the case for yourself, but only after an impartial consideration of the evidence with fellow jurors, and in the course of deliberation you should not hesitate to change your opinion and reexamine your own views if you become convinced it is erroneous, and each of you who finds himself or herself in the minority shall reconsider your views in light of the opinions of the majority, and each of you who finds himself or herself in the majority shall give equal consideration to the views to the minority, but none of you should surrender your honest conviction as to the weight or effect of the evidence solely because of the opinion of fellow jurors or for the mere purpose of returning a verdict.

I am going to request that you resume your deliberations in light of the instructions I have given you, and we will be here again to answer any other notes or questions you might have.

All right, go ahead out.

Court will stand in recess pending the return of the

jury.

(jury out at 3:38 p.m.)

Mr. Pierson: If it please the court, I would like to be heard briefly your Honor.

The Court: Yes, Sir.

Mr. Pierson: The jury's question was ambiguous. What troubles me is the fact that what may have been just a simple question - - I mean, this jury does not know that it is not possible to reach a verdict, it was never been told that. For all the jury knows, maybe they are going to stay here until doomsday until it reaches a verdict.

Now, the jury's question in light of that may have simply meant - -

The Court: It might have, but we don't ask questions to the jury. They ask questions to us.

Mr. Pierson: Well, it seems to me it is simple communication with the jury. The Court's communications, it seems to me, are somewhat oblique, not directly answering the jury's questions.

The Court: Well, but you don't conduct a colloquy with the jury because that's fraught with error or the possibility of error. So, I am not going to sit here and conduct a colloquy with them. There are twelve of them and only one of me.

Do you want to take exception to what I did?

Mr. Pierson: No. I am not doing this for the purpose of taking exception. I'm trying to - - it does seem to me that - - I will say it does seem to me that them coming in with a question like that the court sending them right back out with an instruction like that does have a coercive tendency.

As I say, the other problem is that just my perception is the jury is coming in with these questions, and they are not getting answers to them.

The Court: Well, I think it certainly couldn't have been clearer with regard to partial verdict, and I think they are just asking that again essentially with regard to deadlock, and I think it's entirely appropriate to ask them to keep on with their deliberation.

I suppose they want to know is - - perhaps they want

to know is "deadlock" a verdict; and, if I wanted them to know that, I would have told them that to begin with, and the answer is, no, it's not a verdict. So, I could have easily told them that; but, if I told them that, then you would say that is coercive, too, because that would not have told them that they have a right not to make a decision, and they technically don't have a right not to make a decision. They have got a right to continue to deliberate until they make a decision or I in the exercise of my discretion determine that it is not appropriate to keep them locked up anymore, and I haven't gotten to that point yet.

Mr. Pierson: I am not asking for colloquy, but it seems to me if the court were to say, juror number one, are you all deadlocked - -

The Court: You can't do that. I can't do that. That also violates the supreme court's admonition, which was made in the 19th century, that the court is never to inquiry as to the present state of jury deliberations. I can't do that. This is why we tell them never to report out how they stand numerically. It's an offshoot of that case which was decided in the 1880's,

and I can't remember the name.

All right: Everybody stay close. We are on the verge of something.

(recess taken from 3:45 p.m. until 5:45 p.m.)

The Court: We have a note from the jury that says they have reached a verdict. So, do you want to bring them in, Ron.

It doesn't say verdict. It says we have reached a decision.

(jury in)

The Court: Be seated, please, ladies and gentlemen. We have received a note saying that you have reached a decision.

Mr. Clerk, call the roll, please.

The Clerk: This is the verdict in criminal docket number S-89-0434, United States of America versus Michael Lovell Hinton, Barry Johnson, and Derrick Scott Mitchell.

The Court: The record will reflect all parties are present in person and counsel.

The Clerk: Members of the jury, will you please respond to roll call.

(roll called.)

The Clerk: Members of the jury, are you agreed of your verdict?

The Jurors: We are.

The Clerk: Who shall say for you?

The Jurors: Our foreperson

The Clerk: Would the forelady please stand.

What say you, is the defendant, Michael Lovell Hinton, guilty or not guilty of the matters wherein he stand indicted?

The forelady: The jury finds Michael Lovell Hinton guilty.

The Clerk: What say you, does the jury find the defendant, Barry Johnson, guilty or not guilty of the matters wherein he stand indicted?

The forelady: The jury finds Barry Johnson guilty.

The Clerk: As to defendant, Derrick Scott Mitchell, does the jury find him guilty or not guilty of the matters wherein he stand indicted?

The forelady: The jury finds Derrick Scott Mitchell guilty.

The Court: All right. Does anyone desire a poll?

Mr. Pierson: I would request a poll.

Mr. Burns: I would, your Honor.

The Court: All right. Poll the jury, please.

The Clerk will simply ask each of you if that is the unanimous decision.